Supreme Court, U.S.
FILED
JUL 17 2002

No. 01-1685

# In the Supreme Court of the United States

RHADAMES CHAVEZ, PETITIONER

*v.*

UNIVERSAL MARITIME SERVICE CORPORATION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

THEODORE B. OLSON
*Solicitor General*
*Counsel of Record*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

EUGENE SCALIA
*Solicitor of Labor*
ALLEN H. FELDMAN
*Associate Solicitor*
NATHANIEL I. SPILLER
*Deputy Associate Solicitor*
EDWARD D. SIEGER
*Attorney*
*Department of Labor*
*Washington, D.C. 20210*

## QUESTIONS PRESENTED

1. Whether employer-sponsored medical examinations constitute an impermissible basis for denying compensation, under Section 7 of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 907, for medical treatment that was not necessary to treat any injury covered by the LHWCA, where petitioner did not present that argument to the Benefits Review Board (Board) or the court of appeals.

2. Whether the scope of petitioner's claim under 33 U.S.C. 908(c) for permanent partial disability benefits, which was denied on other grounds, would otherwise have been evaluated as a "scheduled" impairment under 33 U.S.C. 908(c)(19), or as a non-scheduled impairment under 33 U.S.C. 908(c)(21), where petitioner did not present that argument to the Board or the court of appeals.

3. Whether petitioner's Fifth Amendment due process rights prohibited the Board from vacating the decision of the administrative law judge (ALJ) and remanding the case to the same ALJ, where petitioner presented no evidence of ALJ bias or vindictiveness, and where petitioner failed to raise that claim before the Board or the court of appeals.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 2 |
| Argument | 9 |
| Conclusion | 15 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Alabama* v. *Smith*, 490 U.S. 794 (1989) | 14 |
| *Atlantic & Gulf Stevedores, Inc.* v. *Neuman*, 440 F.2d 908 (5th Cir. 1971) | 11 |
| *Bath Iron Works Corp.* v. *Director, OWCP*, 506 U.S. 153 (1993) | 12 |
| *Mitchell* v. *Director, OWCP*, 855 F.2d 485 (7th Cir. 1988) | 9 |
| *NLRB* v. *Donnelly Garment Co.*, 330 U.S. 219 (1947) | 14 |
| *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206 (1998) | 9 |
| *Pool Co.* v. *Director, OWCP*, 206 F.3d 543 (5th Cir. 2000) | 12 |
| *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268 (1980) | 12 |
| *Roger's Terminal & Shipping Corp.* v. *Director, OWCP*, 784 F.2d 687 (5th Cir.), cert. denied, 479 U.S. 826 (1986) | 11 |
| *Shahady* v. *Atlas Tile & Marble Co.*, 682 F.2d 968 (D.C. Cir. 1982), cert. denied, 459 U.S. 1146 (1983) | 11 |
| *Slattery Assocs., Inc.* v. *Lloyd*, 725 F.2d 780 (D.C. Cir. 1984) | 11 |
| *United States* v. *Resendez-Mendez*, 251 F.3d 514 (5th Cir. 2001) | 14 |
| *Withrow* v. *Larkin*, 421 U.S. 35 (1975) | 14 |

Statutes and regulations: Page

Longshore and Harbor Workers' Compensation Act,
33 U.S.C. 901 *et seq.* ..... 2
33 U.S.C. 902(10) ..... 12
33 U.S.C. 904 ..... 2
33 U.S.C. 907(a) ..... 2
33 U.S.C. 907(d)(1)(A) ..... 11
33 U.S.C. 907(e) ..... 4
33 U.S.C. 908(a) ..... 2
33 U.S.C. 908(b) ..... 2
33 U.S.C. 908(c) ..... 2
33 U.S.C. 908(c)(1)-(20) ..... 11, 12
33 U.S.C. 908(c)(19) ..... 12
33 U.S.C. 908(c)(21) ..... 11, 12, 13
33 U.S.C. 908(c)(23) ..... 12
33 U.S.C. 908(e) ..... 2
33 U.S.C. 910(d)(2) ..... 12
33 U.S.C. 913(a) ..... 2
33 U.S.C. 919 ..... 5
33 U.S.C. 919(a) ..... 2
33 U.S.C. 919(c) ..... 2
33 U.S.C. 919(d) ..... 2
33 U.S.C. 921(a) ..... 2
33 U.S.C. 921(b) ..... 2
33 U.S.C. 921(b)(3) ..... 8
33 U.S.C. 921(b)(4) ..... 13
33 U.S.C. 921(c) ..... 2
20 C.F.R.:
Section 702.221 ..... 2
Sections 702.301-702.317 ..... 2
Sections 702.316-702.317 ..... 5
Section 702.348 ..... 2
Section 702.391 ..... 2
Sections 702.401 *et seq.* ..... 2
Section 702.408 ..... 4
Section 801.102 ..... 2

Miscellaneous:

Page

2 Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* (3d ed. 1994) ..... 14

# In the Supreme Court of the United States

No. 01-1685

RHADAMES CHAVEZ, PETITIONER

*v.*

UNIVERSAL MARITIME SERVICE CORPORATION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is unpublished, but the decision is noted at 276 F.3d 576 (Table). The decisions and orders of the Benefits Review Board (Pet. App. 8a-16a, 26a-33a) and the administrative law judge (Pet. App. 17a- 25a, 34a-66a) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on November 19, 2001. A petition for rehearing was denied on February 12, 2002 (Pet. App. 67a-68a). The petition for a writ of certiorari was filed on May 13, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, requires employers to compensate covered employees for disabilities caused by work-related injuries, 33 U.S.C. 904, and to provide reasonable and necessary medical treatment "for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. 907(a); 20 C.F.R. 702.401 *et seq.* See generally 33 U.S.C. 908(a), (b), (c) and (e) (prescribing compensation levels for permanent total disabilities, temporary total disabilities, permanent partial disabilities, and temporary partial disabilities). Claims under the LHWCA are filed with a district director of the Labor Department's Office of Workers' Compensation Programs (OWCP), who investigates and attempts to resolve them. 33 U.S.C. 913(a), 919(a) and (c); 20 C.F.R. 702.221. Unresolved disputes may then be transferred to an administrative law judge (ALJ), 33 U.S.C. 919(c) and (d); 20 C.F.R. 702.301-702.317, 702.348, whose decisions may be appealed to the Benefits Review Board, and the Board's decisions are reviewable by the courts of appeals. 33 U.S.C. 921(a), (b) and (c); 20 C.F.R. 702.391, 801.102.

1. Respondent, Universal Maritime Service Corporation, employed petitioner as a hatch checker to monitor and record cargo containers as they were loaded onto shipping vessels. Pet. App. 37a, 42a. While at work on March 11, 1996, petitioner was struck on his neck and right shoulder by a large piece of ice that fell from a crane. *Id.* at 2a, 20a, 37a. Petitioner claims that he momentarily "blanked out" and experienced pain from the impact, but he continued working until March 14, 1996, when he sought medical attention. *Id.* at 37a-38a, 40a.

Respondent Universal Maritime paid petitioner temporary total disability and medical benefits from March 14, 1996, until April 1, 1996. Pet. App. 9a, 36a. During March and April of 1996, petitioner met three times with his treating physician, Dr. Guillermo Munoz. Dr. Munoz ordered x-rays of petitioner's cervical spine and right shoulder, and he diagnosed petitioner with acute spine strain, acute right shoulder sprain, cervicular radiculopathy, and carpal tunnel syndrome on both sides of the body. *Id.* at 54a.

On April 1, 1996, petitioner was examined by Dr. Steven Nehmer, an orthopedic surgeon, who concluded that petitioner "was engaging in symptom magnification," that he "could return to work" immediately, and that he "was not in need of further treatment." Pet. App. 48a-49a. Dr. Nehmer also opined that petitioner's carpal tunnel symptoms could not have been caused by the alleged injury to his neck and shoulder. *Id.* at 52a.

On May 14, 1996, petitioner was examined by another orthopedic surgeon, Dr. Douglas Bradley, who then became petitioner's authorized treating physician. Petitioner told Dr. Bradley that he could not grasp, stretch his right arm, clean himself, or use a machete to cut bushes. Pet. App. 22a-23a. In response, Dr. Bradley ordered a magnetic resonance imaging (MRI) examination, which was performed on May 16, 1996. *Id.* at 22a. His diagnostic report predicted that if petitioner's MRI results were "grossly okay," he "would get [petitioner] into a more formal rehab program * * * and let them really work on conditioning and strengthening and just work on his motion overall." C.A. App. 43. On May 21, 1996, Dr. Bradley interpreted the MRI results as showing degenerative changes in the spine and mild surface fraying of the right shoulder,

but no evidence of a large herniated disc. Pet. App. 54a-55a. "Given the fact that presumably what happened this time aggravated pre-existing changes," Dr. Bradley said he "would definitely get him into rehab, as I mentioned in the last report." C.A. App. 44.[1]

On June 3, 1996, Dr. Nehmer again examined petitioner and again concluded that he was engaged in symptom magnification, though less seriously than during the April examination. Pet. App. 49a-50a. Dr. Nehmer also interpreted the May 16 MRI data as revealing no medical problem derived from petitioner's neck area. *Id.* at 49a. Upon petitioner's request, the Department of Labor appointed an independent orthopedic surgeon, Dr. Raymond Koval, to provide an impartial assessment of petitioner's medical condition. *Id.* at 55a.[2] After examining petitioner on July 8, 1996, Dr. Koval concluded that petitioner had no work-related injury, that his alleged neck and shoulder injury could not have caused carpal tunnel syndrome, and that he did not need further medical care. *Id.* at 29a, 56a.

On June 16, 1996, petitioner returned to work as a hatch checker. On October 2, 1996, at his counsel's request, petitioner was examined by Dr. William Tevlin and an orthopedic surgeon, Dr. David Myers. Pet. App.

---

[1] On June 11, 1996, Dr. Bradley recorded that petitioner showed "marked improvement with the therapy program. He's definitely moving his [shoulder] and everything much better than before." C.A. App. 44.

[2] See generally 33 U.S.C. 907(e) ("In the event that medical questions are raised in any case, the Secretary shall have the power to cause the employee to be examined by a physician employed or selected by the Secretary and to obtain from such physician a report containing his estimate of the employee's physical impairment and such other information as may be appropriate."); 20 C.F.R. 702.408.

56a, 59a. Those doctors also reviewed Dr. Bradley's diagnosis, the May 16 MRI data, a March 14 x-ray examination, petitioner's physical therapy records, Dr. Nehmer's June 5 report, and Dr. Koval's July 8 report. C.A. App. 54. On that basis, Drs. Tevlin and Myers concluded that petitioner had a "permanent orthopedic disability of 21% impairment of the whole person." Pet. App. 57a.

In November 1997, petitioner was reassigned from his position as hatch checker to an office-based clerk's position. Pet. App. 30a, 40a. According to respondent's safety manager, Stanley Lysick, petitioner's reassignment represented a consensus decision by the manager, the general manager, and the shop steward, and was based on petitioner's mistakes before and after his injury, including one incident in which petitioner neglected his responsibilities while completing a crossword puzzle. *Id.* at 45a-47a.

2. Petitioner filed a claim for LHWCA benefits in August 1996. On May 13, 1997, the OWCP district director transferred petitioner's case for formal proceedings before an ALJ.[3] Petitioner sought to recover permanent partial disability benefits after June 16, 1996, and temporary total disability and medical benefits from April 2, 1996, until June 16, 1996. See Pet. App. 36a. After an evidentiary hearing, the ALJ did not grant petitioner's request for permanent partial disability benefits, *id.* at 65a-66a, and he awarded temporary total disability benefits and medical expenses only from April 2, 1996, until May 22, 1996. *Id.* at 34a-66a. The ALJ found petitioner's testimony "not creditable relative to the extent of his injury," for

---

[3] See 33 U.S.C. 919 (describing hearing procedures for LHWCA claims); 20 C.F.R. 702.316-702.317.

reasons including: his having worked for three days before seeking medical help, his attempt to cut bushes with a machete, discrepancies between his testimony at the hearing and prior statements to Drs. Nehmer and Koval, and Dr. Nehmer's description of symptom magnification. *Id.* at 59a-62a. The ALJ also did not credit the medical report of Drs. Tevlin and Myers, which he held was not "well reasoned or accurate" because it contained factual misstatements and relied on petitioner's exaggerated account of his symptoms. *Id.* at 63a. In contrast, the ALJ gave "great weight" to the opinions of Drs. Nehmer and Koval that petitioner had no work-related injury, and that any symptoms of carpal tunnel syndrome were not caused by the neck and shoulder injury. *Id.* at 53a, 56a, 62a. The ALJ also credited Dr. Nehmer's opinion "that [petitioner] was exaggerating his symptoms." *Id.* at 53a.

Respondent Universal Maritime appealed to the Board, seeking to vacate petitioner's award of temporary total disability and medical benefits from April 1, 1996, until May 22, 1996. Petitioner cross-appealed, asserting that he deserved permanent partial disability benefits after June 16, 1996, and temporary total disability and medical benefits from May 22, 1996, until June 16, 1996. In August 1998, the Board issued an opinion agreeing with the ALJ that permanent partial disability benefits were not warranted, but vacating the ALJ's decision to cease temporary total disability and medical benefits as of May 22, 1996. Pet. App. 26a-33a.

The Board rejected petitioner's argument for permanent partial disability benefits because "the evidence which the [ALJ] credited establishes that [petitioner] was capable of performing his usual work as a hatch checker, and that his removal from this position [in November 1997] was not related to his work injury."

Pet. App. 30a. With respect to temporary total disability and medical benefits, however, the Board found that the ALJ's cut-off date—May 22, 1996—was inconsistent with the evidence he had deemed credible. *Id.* at 30a-32a. Specifically, the Board noted that Dr. Nehmer had found no injury as of April 1, 1996; that Dr. Bradley had recommended physical therapy until June 17, 1996; and that Dr. Koval's examination on July 8, 1996, proved nothing about petitioner's status on May 22, 1996. *Id.* at 29a-30a. The Board also noted that medical benefits could be awarded without proof of disability if they were reasonably necessary for treating a work-related injury. *Id.* at 31a. Accordingly, the Board remanded the case to the ALJ to "address Dr. Bradley's recommendation that [petitioner] undergo physical therapy and his judgment that such therapy was beneficial to [petitioner]." *Id.* at 32a.

3. On remand, the ALJ again awarded petitioner no permanent partial disability benefits, Pet. App. 20a, and again awarded temporary total disability benefits and medical expenses from March 11, 1996, until May 22, 1996. *Id.* at 17a-25a. The ALJ explained his May 22 cut-off date because, although Dr. Nehmer had found no disability on April 1, "[petitioner] was entitled to an objective test, the MRI," *id.* at 23a, which was performed on May 16 and evaluated on May 21 (see p. 3, *supra*), and which "was reported as negative." Pet. App. 23a. After analysis of the MRI was complete, however, the ALJ "deemed * * * further care * * * unnecessary," including Dr. Bradley's prescribed physical therapy, which was based on petitioner's exaggerations regarding his condition. *Id.* at 22a-24a; see *id.* at 24a ("I allowed the MRI to rule out any and all disability and concluded that the Employer was responsible until May 22, 1996. To extend treatment further

* * * would be an unjustifiable expense to the Employer.").

Petitioner appealed the ALJ's decision, and the Board affirmed in an unpublished opinion. Pet. App. 8a-16a. With respect to permanent partial disability, the Board reiterated its earlier finding that petitioner "did not establish that the loss of his usual work was due to the work injury." *Id.* at 10a. The Board also declined to extend petitioner's temporary total disability and medical benefits, because it held that the ALJ had permissibly credited a combination of MRI data (which indicated no injury as of May 21, 1996) and Dr. Nehmer's medical judgment (which indicated no injury as of April 1, 1996). *Id.* at 11a-12a, 14a. "The administrative law judge thus found that Dr. Bradley's recommendation for further physical therapy, based in large part on [petitioner's] subjective complaints, was not necessary." *Id.* at 14a. See generally 33 U.S.C. 921(b)(3) ("The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole.").

6. On appeal to the Third Circuit, petitioner argued: (i) that his testimony and the reports of Drs. Munoz, Bradley, and Tevlin proved that he was permanently partially disabled (Chavez C.A. Br. 7-8); (ii) that the documentary evidence supporting his reassignment was insufficient (*id.* at 8-9); (iii) that "it seems illogical" for the ALJ to allow compensation for Dr. Bradley's MRI examination but to deny the necessity of physical therapy prescribed thereafter (*id.* at 10-11); and (iv) that it would appear "more logical" to credit the judgment of Dr. Bradley, the authorized treating doctor, as corroborated by petitioner's testimony (*id.* at 11-12). In an unpublished opinion, the court of appeals rejected

those arguments and affirmed the Board's decision. Pet. App. 1a-5a. The court held that the ALJ had exclusive authority to weigh evidence and draw factual conclusions, and that the decision to credit evidence from Drs. Nehmer and Koval over evidence from other sources provided adequate support for the ALJ's judgment. *Id.* at 3a-4a.

**ARGUMENT**

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any court of appeals. Moreover, petitioner has not previously raised any of the arguments he now asks this Court to consider. Accordingly, the petition should be denied. See, *e.g.*, *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Mitchell* v. *Director, OWCP*, 855 F.2d 485, 491 n.7 (7th Cir. 1988) ("Absent exceptional circumstances, we do not consider issues that were not raised before the Board.").

1. In the proceedings below, petitioner asserted that the ALJ's factual findings—that petitioner's reassignment was unrelated to his injury, and that medical care was unnecessary after May 22, 1996—were not supported by substantial evidence. See Chavez C.A. Br. 3-13. The court of appeals rejected those factual objections (Pet. App. 4a-5a), and petitioner has not renewed them here. Pet. 11-14.[4]

---

[4] In any event, the ALJ's findings were amply supported by Lysick's testimony with respect to petitioner's work reassignment, and by the MRI data and the opinions of Drs. Nehmer and Koval with respect to his medical status on May 22, 1996. Pet. App. 9a-

Instead, petitioner raises three legal issues, none of which was presented to the Board or to the court of appeals. First, he asserts an entitlement to all medical expenses after April 1, 1996, because the ALJ "relie[d] heavily on an employer-sponsored examination [by Dr. Nehmer] to deny" petitioner's claim for expenses after May 22, 1996. Pet. 13. Petitioner acknowledges that appellate courts should generally "defer to * * * administrative law judges" (Pet. 12) in their assessments of witness credibility and factual conflicts, and he does not ask the Court to revisit any particular factual determinations in this case. See p. 9, *supra*. Rather, petitioner apparently suggests (Pet. 12-13) that employer-sponsored medical examinations, as a matter of law, present an invalid basis for limiting a claimant's medical benefits. No court has so flatly disfavored employer-sponsored medical examinations, however; such examinations often (as in this case) are deemed to have important evidentiary value. Furthermore, the ALJ's conclusions here rest on a *combination* of Dr. Nehmer's views, Dr. Koval's independent analysis, and Dr. Bradley's MRI data—which is why petitioner received medical benefits through May 22, 1996, even though Dr. Nehmer found no injury as of April 1, 1996. The court of appeals correctly declined to reexamine the ALJ's appraisal of that conflicting testimony and disputed medical evidence.

Petitioner's proposed analogy between the ALJ's legal decision in this case and "an employer's physician who has stopped treatment" (Pet. 13) is unpersuasive. With respect to the latter, "when an injured employee has been told by [the employer's physician] that he is

---

15a, 30a-31a. Such inherently fact-bound determinations do not warrant review by this Court.

recovered from his injury and requires no further treatment, he has * * * been refused treatment by his employer, and he needs only to establish that treatment he subsequently procures * * * was *necessary* treatment for the injury." *Atlantic & Gulf Stevedores, Inc.* v. *Neuman*, 440 F.2d 908, 911 (5th Cir. 1971) (emphasis added).[5] But that principle does not allow claimants to recover medical expenses—like petitioner's expenses after May 22—that are deemed *unnecessary*. Indeed, petitioner's argument curiously suggests that an ALJ's finding that expenses were unnecessary might somehow (if based on an employer-sponsored examination) support a claim to recover those expenses under the LHWCA. Petitioner cites no case overturning an ALJ's factual findings simply because they relied on an employer-sponsored medical examination, however, and no such result is warranted here.

2. Petitioner also seems to argue (Pet. 14) that the court of appeals wrongly evaluated his permanent partial disability claim as a "scheduled" impairment, under 33 U.S.C. 908(c)(1)-(20), instead of applying 33 U.S.C. 908(c)(21)'s provision for "[o]ther cases." The LHWCA lists a schedule of particular bodily injuries for which benefits may be awarded only for a set number of weeks, 33 U.S.C. 908(c)(1)-(20). In "[o]ther cases," involving other types of injuries, benefits are allowed for the period of a claimant's diminished wage-earning capacity, 33 U.S.C. 908(c)(21). See generally

---

[5] Accord *e.g.*, *Roger's Terminal & Shipping Corp.* v. *Director, OWCP*, 784 F.2d 687, 693 (5th Cir.), cert. denied, 479 U.S. 826 (1986); *Slattery Assocs., Inc.* v. *Lloyd*, 725 F.2d 780, 784 (D.C. Cir. 1984); *Shahady* v. *Atlas Tile & Marble Co.*, 682 F.2d 968, 970 (D.C. Cir. 1982), cert. denied, 459 U.S. 1146 (1983); cf. 33 U.S.C. 907(d)(1)(A) (stating that employees may not recover medical expenses unless they request such treatment from their employer).

*Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 269-270 (1980) (describing pertinent statutory provisions).[6]

As petitioner admits, "[t]he Third Circuit did not address the issue presented on permanent partial disability." Pet. 14. In fact, the Third Circuit and the Board did not distinguish between scheduled impairments and "[o]ther" impairments because petitioner never raised that argument, see pp. 8-10, *supra*. Moreover, the distinction is irrelevant because petitioner's claim fails under either system of compensation. Petitioner cannot claim a scheduled impairment, under 33 U.S.C. 908(c)(1)-(20), because the LHWCA's list includes neither neck nor shoulder injuries.[7]

---

[6] Petitioner apparently believes that his disability should be viewed as a "whole person" impairment. Pet. 14; see Pet. App. 57a (quoting similar language from the report of Drs. Tevlin and Myers). But the term "whole person," which the LHWCA itself does not use, appears only in American Medical Association guidelines for evaluating physical impairment; under the LHWCA, those guidelines apply only in determining "compensation for retirees who suffer from occupational diseases that do not become disabling until after retirement." *Bath Iron Works Corp.* v. *Director, OWCP*, 506 U.S. 153, 155 (1993); see *id.* at 154-159 & n.9 (differentiating statutory compensation schemes for scheduled, non-scheduled, and "whole person" disabilities); see 33 U.S.C. 908(c)(23); 33 U.S.C. 910(d)(2); 33 U.S.C. 902(10). As the ALJ noted, such "whole person" impairment ratings do not pertain to scheduled injuries under 33 U.S.C. 908(c)(19), Pet. App. 57a, nor do they apply to "[o]ther cases" under 33 U.S.C. 908(c)(21).

[7] Petitioner invokes (Pet. 14) the Fifth Circuit's opinion in *Pool Co.* v. *Director, OWCP*, 206 F.3d 543, 547-548 (2000). But *Pool* held only that employees with bodily injuries that do not appear on the LHWCA's schedule must recover under the "other cases" provision, 33 U.S.C. 908(c)(21), even if their symptoms affect body parts that are on the schedule. Petitioner has not endeavored to explain how that principle might apply to his case.

Petitioner also cannot recover under 33 U.S.C. 908(c)(21)'s provision for "[o]ther cases," because he has not shown any decreased wage-earning capacity. In June 1996, petitioner returned to work as a hatch checker, and the ALJ credited Lysick's testimony that petitioner was later reassigned because of poor job performance that was not related to his neck and shoulder injury. Pet. App. 20a, 63a-64a. The Board affirmed that factual finding (*id.* at 10a, 30a-31a), and so did the court of appeals (*id.* at 4a).[8] Because petitioner has not challenged the factual basis for denying his permanent partial disability claim, because no pertinent circuit conflict appears, and because petitioner has not previously raised the argument he now asserts, this Court should deny review.

3. Finally, petitioner claims that "[t]he practice of remanding to the same [ALJ]" when an ALJ's decision is vacated for further consideration "should be reviewed" as a possible due process violation. Pet. 14. See generally 33 U.S.C. 921(b)(4) ("The Board may, on its own motion or at the request of the Secretary, remand a case to the administrative law judge for further appropriate action."). Here, however, both petitioner and respondent *requested* such a remand, see Pet. App. 29a ("We agree with the parties' contentions that this case must be remanded to the administrative law judge for further findings * * * ."), and petitioner never raised any due process objection during the proceedings below.

---

[8] Although the court of appeals' opinion did not specifically mention Lysick's testimony, it adverted to such evidence by noting that the ALJ's decision was not only based on expert reports, but "also included statements of lay persons," Pet. App. 4a, like Lysick.

The proposed basis for petitioner's argument is *United States* v. *Resendez-Mendez*, 251 F.3d 514 (5th Cir. 2001), which applied a presumption of "vindictiveness" to a district judge's decision that imposed a harsher criminal sentence after a court of appeals remanded the case. There is no basis for applying that presumption here. Petitioner cites no case extending such principles of vindictiveness to administrative determinations, and this Court has noted a "presumption of honesty and integrity in those serving as [administrative adjudicators]." *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975). Indeed, other contexts clarify that an ALJ is not disqualified from remand proceedings simply because he was reversed on an earlier ruling. *NLRB* v. *Donnelly Garment Co.*, 330 U.S. 219, 236-237 (1947); see 2 Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 9.8, at 86 (3d ed. 1994).

Furthermore, in this case, the ALJ's ruling on remand was identical to (not harsher than) his previous decision, see Pet. App. 25a, 66a, and petitioner could not have been "punished" for appealing the ALJ's earlier decision because *respondent* filed that appeal; petitioner only filed a cross-appeal. *Id.* at 27a. The present facts thus yield no articulable basis to suspect, much less presume, unconstitutional vindictiveness. Cf. *Alabama* v. *Smith*, 490 U.S. 794, 799 (1989) (explaining, in the criminal context, that a presumption of vindictiveness is only warranted in cases with a reasonable likelihood "that the increase in sentence is the product of actual vindictiveness").

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
*Solicitor General*

EUGENE SCALIA
*Solicitor of Labor*

ALLEN H. FELDMAN
*Associate Solicitor*

NATHANIEL I. SPILLER
*Deputy Associate Solicitor*

EDWARD D. SIEGER
*Attorney*
*Department of Labor*

JULY 2002